

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SEAN ERIC BISHOPP,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

G057591

(Super. Ct. No. 16WF1256)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Gary S. Paer, Judge. Petition granted.

Appellate Defenders, Inc., Michelle C. Rogers, for Petitioner.

No appearance for Respondent.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Michael Pulos and Kathryn Kirschbaum, Deputy Attorneys General, for Real Party in Interest.

THE COURT: *

Petitioner Sean Eric Bishopp filed a notice of appeal from an order denying his motion to withdraw his guilty plea. Bishopp contends respondent court abused its discretion when it denied his request for a certificate of probable cause to challenge the court's ruling. We agree and therefore grant the petition.

FACTS

According to the *Tahl* waiver, Sean Eric Bishopp admitted that “[On] June 12, 2016, [he] aided and abetted [accomplice 1] and [accomplice 2] commit grand theft by driving the vehicle used to drive them and the stolen property from the scene. Further, when [he] acted, [he] intended to aid and abet [accomplice 1] and [accomplice 2] commit grand theft. During the grand theft, [accomplice 1] used force against loss prevention officers to retain possession of the property. [Bishopp] also conspired with [accomplice 1] and [accomplice 2] to commit theft from Saks Fifth Ave. Finally, [Bishopp] resisted Costa Mesa police officers [] by using force or fear while they were lawfully performing their duties.”

Forty-five days after pleading guilty, Bishopp filed a motion to withdraw his guilty plea. In the declaration in support of the motion Bishopp explained that he told counsel on multiple occasions that the facts in the police report of his arrest were false. Bishopp explained further that after pleading guilty he discovered the arresting officers were the subject of misconduct committed in the course of their employment as law enforcement officers.

The trial court conducted a hearing in February 2019. During the hearing on the motion trial counsel testified, exhibits were admitted, and the parties stipulated to

* Before O’Leary, P. J., Moore, J., and Thompson, J.

an inconsistency in the audio recording of Bishopp's arrest. Respondent court denied Bishopp's motion to withdraw his guilty plea and he filed a notice of appeal. In his request for a certificate of probable cause to challenge the validity of the plea, Bishopp stated his guilty plea was not knowing or voluntary on the basis that he was deprived of constitutionally guaranteed effective assistance of counsel because counsel failed to file a *Pitchess* motion to discover evidence to attack the credibility of the arresting officers, failed to pursue exculpatory evidence that was later destroyed prior to the date of his plea, and failed to investigate inconsistencies in the audio recording of his arrest. Respondent court denied the request stating, "Under authority of California Penal Code Sec. 1237.5, the Court hereby certifies that there is not probable cause for an appeal in this case."

Bishopp filed a petition for writ of mandate in this court alleging that respondent court abused its discretion when it denied his request for a certificate of probable cause. The Attorney General was invited to file informal opposition to the petition and after it was received, the court invited further opposition citing *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.

DISCUSSION

Penal Code section 1237.5¹ states that no appeal may be taken from a guilty plea without first filing a written statement "showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" and the trial court has executed and filed a certificate of probable cause for such appeal. (§ 1237.5, subds. (a) & (b).) A claim the trial court abused its discretion when it denies a motion to withdraw a guilty plea requires a certificate of probable cause. (*People v. Ribero* (1971) 4 Cal.3d 55.)

¹ All further statutory references are to the Penal Code.

The standard by which the trial court must issue a certificate of probable cause under section 1237.5 requires only that the defendant present “any cognizable issue for appeal which is not *clearly* frivolous or vexatious.” (*People v. Johnson* (2009) 47 Cal.4th 668, 676, original italics.) The test is not whether the appeal will succeed. “[T]he test . . . is whether the appeal is clearly frivolous and vexatious or whether it involves an honest difference of opinion.” (*People v. Ribero, supra*, 4 Cal.3d 55, 63, fn. 4.) “Thus, if the statement submitted by the defendant in accordance with section 1237.5 presents any cognizable issue for appeal which is not clearly frivolous and vexatious, the trial court abuses its discretion if it fails to issue a certificate of probable cause. [Citations.]” (*People v. Holland* (1978) 23 Cal.3d 77, 84, disapproved on other grounds in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098 and fns. 7, 9.)

The Attorney General contends that respondent court did not abuse its discretion when it denied Bishopp’s request for a certificate of probable cause because Bishopp’s claim that he received ineffective assistance based on counsel’s failure to file a *Pitchess* motion, failure to pursue exculpatory evidence, and failure to investigate inconsistencies in the audio recording of his arrest is “clearly frivolous,” “had no legal basis,” and the request for a certificate of probable cause was properly denied.

Citing *Strickland v. Washington* (1984) 466 U.S. 668, the Attorney General argues that Bishopp failed to demonstrate that trial counsel’s representation fell below the objective standard of reasonableness under prevailing professional norms, and that he suffered prejudice as a result of counsel’s deficient representation. In response to Bishopp’s claim of deficient representation, the Attorney General states that Bishopp’s motion to withdraw his guilty plea does not provide details as to how counsel’s alleged failures would have provided information that would have been relevant to Bishopp’s defense.

With respect to the requirement that Bishopp demonstrate prejudice, the Attorney General states that Bishopp also failed to provide details to how he was

prejudiced by counsel's failure to investigate and file a *Pitchess* motion. According to the Attorney General, Bishopp "made no effort to demonstrate how any of these allegations prejudiced him," and as such, his "motion for a new trial [*sic*] claiming ineffective assistance of counsel [] fell far short of his burden to demonstrate prejudice."

The Attorney General concludes by stating that "because any appeal from the trial court's denial of Bishopp's motion for a new trial [*sic*] based on ineffective assistance of counsel would have been clearly frivolous, the trial court's denial of Bishopp's request for a certificate of probable cause was proper and did not amount to an abuse of discretion."

Section 1018 states in part, "On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."

A contested motion was held in February 2019. The parties stipulated to an inconsistency in the audio recording of the arresting officers. According to Bishopp, three officers were involved in his arrest – Officers Tripp, Gallardo, and Selinske, and each officer was equipped with a digital audio recording device. According to the stipulation, the National Center for Audio and Visual Forensics (NCAVF) reviewed the Digital Audio Recording System (DARS) and determined that approximately 2 minutes and 38 seconds of the audio captured on Gallardo's DARS, was not present on Tripp's DARS. According to the stipulation, "NCAVF concluded that the discrepancy could have been due to the officer, either intentionally or unintentionally, turning off the device or the audio could have been deliberately removed by some unknown party from the disc afterwards."

According to Bishopp, his guilty plea was not a knowing and voluntary waiver of his constitutional rights because when he relied on the advice of counsel to plead guilty, he was unaware that counsel had not conducted an investigation that would

have disclosed evidence that could have provided a defense at trial and supported his repeated claims that the police report was false. “Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea” (*People v. Cruz* (1974) 12 Cal.3d 562, 566) and “[t]he constitutional right to the effective assistance of counsel is ‘among the most sacred and sensitive of our civil rights.’” (*People v. Holland, supra*, 23 Cal.3d at p. 86.)

A court must issue the certificate if the defendant’s statement under section 1237.5 presents “‘any cognizable issue for appeal which is not *clearly* frivolous and vexatious’ [Citation.]” (*People v. Johnson, supra*, 47 Cal.4th at p. 676, original italics.) Bishopp’s request for a certificate of probable cause in this case was based on reasonable constitutional grounds going to the legality of the proceedings that were not “clearly” frivolous or vexatious, and as such, he is entitled to relief.

DISPOSITION

Let a peremptory writ of mandate issue ordering respondent court to vacate its order filed on February 27, 2019, denying petitioner’s request for certificate of probable cause, and to enter a new and different order granting petitioner’s request for certificate of probable cause. In the interest of justice, the opinion in this matter is deemed final as to this court forthwith and the clerk is directed to issue the remittitur forthwith. (Cal. Rules of Court, rule 8.490(b)(2)(A).)